

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PENNY L. PATINO, as trustee of PENNY
L. PATINO'S LIVING TRUST,

Plaintiff,

v.

RECONTRUST COMPANY, N.A.; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC.; BANK OF AMERICA; BANK OF
AMERICA HOME LOANS; BAC HOME LOAN
SERVICING, L.P.; COUNTRYWIDE HOME
LOANS, INC.; THE BANK OF NEW YORK
MELLON, formerly known as THE BANK OF
NEW YORK as trustee for CERTIFICATE
HOLDERS CWALT, INC. 2006 OA 11
MORTGAGE PASS-THROUGH CERTIFICATES,

Defendants.

No. C 11-00345 CW

ORDER GRANTING
PLAINTIFF'S
MOTION TO REMAND
(Docket No. 6)

Plaintiff Penny L. Patino, as trustee of Penny L. Patino's
Living Trust, brings claims against Defendants ReconTrust Company,
N.A., et al., arising from the foreclosure of real property.
Plaintiff moves to remand her action to Contra Costa Superior
Court. Defendants oppose the motion. The motion was taken under
submission on the papers. The Court denied Plaintiff's motion
without prejudice to being reset if mediation were to prove
unsuccessful. Docket No. 63. Defendants have advised the Court
that mediation has been unsuccessful. Docket No. 65. Having
considered the papers submitted by the parties, the Court GRANTS
Plaintiff's motion to remand. Because the case will be remanded,
the Court declines to reset for hearing Plaintiff's and Defendants'
other motions.

BACKGROUND

Plaintiff, a California resident, filed her complaint in Contra Costa Superior Court, asserting claims related to the foreclosure of property located at 8 Hermosa Court in Danville, California. Her claims are brought against various Defendants, including ReconTrust, which is allegedly a California citizen.

On January 7, 2011, ReconTrust filed a Declaration of Nonmonetary Status in state court. On January 19, 2011, Plaintiff objected to ReconTrust's filing. In her objection, Plaintiff contended that ReconTrust did not satisfy the requirements of California Civil Code sections 2923.5 or 2924 before it filed a notice of default.¹

Plaintiff brings claims for (1) wrongful foreclosure based on a violation of Civil Code sections 2923.5 and 2924; (2) quiet title; (3) slander of title; (4) declaratory relief; and (5) intentional infliction of emotional distress. Plaintiff intends to seek a declaration that, among other things, Defendants did not comply with Civil Code section 2923.5.

Defendants ReconTrust, N.A.; Bank of America; BAC Home Loans Servicing, L.P.; Countrywide Home Loans, Inc.; and The Bank of New York Mellon, formerly known as The Bank of New York, as Trustee for

¹ In her complaint, Plaintiff refers to a declaration regarding due diligence that Defendants never presented to her. See, e.g., Compl. at 10-11. Along with her motion to be referred to the Court's Alternative Dispute Resolution (ADR) program, Plaintiff included a letter she sent to Defendants' counsel, to which was attached a "California Declaration" by Sheila Stephens, "Mortgage Servicing Specialist II of BAC Home Loan Servicing, LP." See Docket No. 29, at 3. None of the boxes on the declaration, apparently related to the due diligence requirement of Civil Code section 2923.5(g), were checked.

1 Certificate Holders Cwalt, Inc. 2006 OA 11 Mortgage Pass-Through
2 Certificates removed Plaintiff's action on January 24, 2011
3 pursuant to the Court's diversity jurisdiction. 28 U.S.C. § 1332.

4 LEGAL STANDARD

5 A defendant may remove a civil action filed in state court to
6 federal district court so long as the district court could have
7 exercised original jurisdiction over the matter. 28 U.S.C.
8 § 1441(a). Title 28 U.S.C. § 1447(c) provides that if, at any time
9 before judgment, it appears that the district court lacks subject
10 matter jurisdiction over a case previously removed from state
11 court, the case must be remanded. On a motion to remand, the scope
12 of the removal statute must be strictly construed. Gaus v. Miles,
13 Inc., 980 F.2d 564, 566 (9th Cir. 1992). "The 'strong presumption'
14 against removal jurisdiction means that the defendant always has
15 the burden of establishing that removal is proper." Id. Courts
16 should resolve doubts as to removability in favor of remanding the
17 case to state court. Id.

18 DISCUSSION

19 Plaintiff argues that, because she and ReconTrust are citizens
20 of California, the Court lacks diversity jurisdiction over her
21 action. Defendants do not dispute that ReconTrust is a California
22 citizen. Instead, they argue that ReconTrust's citizenship should
23 be disregarded because it is a nominal party based on its
24 declaration of non-monetary status filed in state court. They also
25 assert that remand is improper because Plaintiff fraudulently
26 joined ReconTrust to this action. Neither of these arguments is
27 availing.

1 Under California law, a trustee under a deed of trust that
2 "maintains a reasonable belief that it has been named in the action
3 or proceeding solely in its capacity as trustee, and not arising
4 out of any wrongful acts or omissions on its part in the
5 performance of its duties as trustee, . . . may file a declaration
6 of nonmonetary status." Cal. Civ. Code § 2924l(a). If a plaintiff
7 does not object timely to a trustee's filing of such a declaration,
8 "the trustee shall not be required to participate any further in
9 the action or proceeding." Id. § 2924l(d). However, in "the event
10 of a timely objection to the declaration of nonmonetary status, the
11 trustee shall thereafter be required to participate in the action
12 or proceeding." Id. § 2924l(e). Defendants incorrectly assert
13 that Plaintiff did not file a timely objection in state court.
14 Plaintiff provides evidence, and a review of the state court docket
15 shows, that she objected timely to ReconTrust's declaration. Thus,
16 ReconTrust's declaration does not make it a nominal party or excuse
17 it from participating in this case.

18 Furthermore, Defendants fail to establish that ReconTrust is
19 fraudulently joined. To make a showing of fraudulent joinder,
20 Defendants "must demonstrate that there is no possibility" that
21 Plaintiff will be able to establish a cause of action in state
22 court against ReconTrust. Lantz v. DaimlerChrysler Corp., 2005 WL
23 1629937, at *1 (N.D. Cal.). There is a general presumption against
24 finding fraudulent joinder, and Defendants carry "a heavy burden of
25 persuasion." Plute v. Roadway Package Sys., Inc., 1141 F. Supp. 2d
26 1005, 1008 (N.D. Cal. 2001). Plaintiff has alleged sufficient
27 facts suggesting that ReconTrust did not satisfy its obligations as
28

1 trustee under Civil Code section 2923.5 and 2924. Defendants'
2 reference to the tender rule is inapplicable here; there is no
3 evidence that the Hermosa Court property has been sold at a
4 trustee's sale. See, e.g., Delgado v. Bank of Am. Corp., 2009 WL
5 4163525, at *4 (E.D. Cal.) (discussing requirement of plaintiff to
6 allege tender of indebtedness "to state a cause of action to set
7 aside a foreclosure").

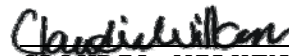
8 Because ReconTrust is not a nominal party excused from
9 participating in this action and because it was not fraudulently
10 joined, its California citizenship precludes the Court from
11 exercising diversity jurisdiction. Accordingly, because subject
12 matter jurisdiction is lacking, Plaintiff's action will be remanded
13 to state court.

14 CONCLUSION

15 For the foregoing reasons, the Court GRANTS Plaintiff's motion
16 to remand (Docket No. 6). The Clerk shall remand this action to
17 Contra Costa Superior Court and close the file.

18 IT IS SO ORDERED.

19
20 Dated: 2/6/2012



CLAUDIA WILKEN

United States District Judge